IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-804

JOY A. FARMER, Special Administrator
of the Estate of Richard T. Hill,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, LOCAL 25, *et al.*,
Respondents.

**On Writ of Certiorari to the California Court of Appeal
Second Appellate District**

BRIEF FOR RESPONDENTS

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OPINION BELOW

The Superior Court wrote no opinion. The opinion of the Court of Appeal of the State of California is reported at 49 Cal.App. 3d 614, 122 Cal. Rptr. 722.

The opinion is reproduced as Appendix A to the Petition for a Writ of Certiorari. (Pet.A. 1-28) [1]

JURISDICTION

The opinion and judgment of the Court of Appeal was filed on June 30, 1975. (See Pet.A. 1-28.) A timely Petition for Hearing in the California Supreme Court was denied without opinion on September 10, 1975. (See Pet.B. 1.) A timely Petition for Certiorari was filed in this Court on December 5, 1975. The Writ of Certiorari was granted on January 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Because Petitioner reserves the right to resist entry of judgment dismissing the complaint (Pet. 10, n. 5 and P. Br. 12, n. 7.), there is a substantial question whether the judgment below was "final" within the meaning of this provision. The issue of jurisdiction is discussed at pp. 21-27 *infra*.

QUESTION PRESENTED

May a state court judgment in an action for intentional infliction of emotional distress stand consistent with the National Labor Relations Act where the

[1] "Pet." refers to the Petition for Certiorari. "P. Br." will refer to petitioner's brief in this Court. The four-volume record appendix in this Court will be cited as "A." preceded by the volume number; because volume IV consisting of exhibits is unpaginated, reference will be to the exhibit number. "Cl. Tr." refers to the Clerk's transcript in the court below, and "Rep. Tr." refers to the Reporter's transcript in the court below; the former contains formal documents and the latter is transcript of the trial, consisting of 12 volumes.

"crux" of the action is actual and threatened refusals to refer the plaintiff from a union hiring hall due to plaintiff's intra-union political opposition to the union business agent, and where the jury is instructed that the plaintiff has recovered from the defendant union back pay for such discrimination in a proceeding before the National Labor Relations Board, but that that agency lacks power to award damages for pain and suffering, medical expenses and punitive damages?

STATUTES AND RULES INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 8(b)-(1)(A), 8(b)(2) and 10(a), (b) and (c) of the National Labor Relations Act of 1935, as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 73 Stat. 519, *et seq.* It also involves 28 U.S.C § 1257(3) and Rules 23(1)(c) and 23(1)(f) of this Court. These provisions are reproduced in Appendix A *infra*.

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE DISTRICT COURT

1. The Complaint

The original Complaint was filed on April 17, 1969 by Richard T. Hill, referred to as "Hill", against the United Brotherhood of Carpenters and Joiners of America, Local 25, referred to as "Local 25", the Los Angeles County District Council of Carpenters, referred to as "The District Council", and the United Brotherhood of Carpenters and Joiners, referred to as "United Brotherhood", and individual defendants who were business agents from time to time of Local 25 identified as Earl George Daley, Benjamin Fenwick,

Joseph Wilk, James Keane, and Kenneth Scott. (IA. 1).[2]

A first Amended Complaint was filed by Petitioner on March 7, 1972, (IA. 1-16) stating four causes of action. The first four paragraphs of the first cause of action identified the parties, alleged that at all times "each of the Defendants was the agent and employee of each of the remaining Defendants and was * * * acting within the purpose and scope of said agency and employment." Paragraph 5 alleged that Plaintiff "was * * * a journeyman carpenter and member in good standing" in each of defendant labor organizations, and that he "has duly sought and exhausted all of his remedies provided for in the constitutions and/or by-laws of the aforesaid organizations." (IA. 2-3).

Paragraphs 6 and 7 alleged the existence of a Master Labor Agreement between the carpenters' union and contractors, and set forth in detail provisions of the Agreement to hiring and dispatching procedures of the Union. Paragraph 8 alleged that he signed the out-of-work list and requested work, but the defendants refused to dispatch him and engaged in discriminatory practices by refusing to dispatch him or dispatching him to short or less desirable jobs. Paragraph 9 alleged that the reason for defendant's discriminatory action was that he was a member of an opposing union faction. Paragraph 10 alleged that the "intentional

[2] Mr. Hill, the original petitioner, died intestate on January 28, 1976, and an uncontested motion to substitute Joy A. Farmer as special administratrix of his estate was granted by this Court. We shall follow the form of petitioner's brief in using the term "petitioner" to refer to Hill, who will also from time to time be described as "plaintiff."

and wrongful discriminatory conduct practiced by defendants caused him to suffer a nervous breakdown, grievous mental anguish and bodily injury making him lame, sore and sick" and that he incurred medical expenses; he claimed $500,000 compensatory damages. Paragraph 11 alleged that the foregoing acts "were committed deliberately and maliciously" and sought $500,000 punitive damages. (IA. 4-9).

The second cause of action (which alone went to trial, see p. 7 *infra*) realleged paragraphs 1, 2, 3, 4, 5, 10, and 11 of the first cause of action described above. The second cause of action did *not* reallege paragraph 6 of the first cause of action which pleaded the collective bargaining agreement between the carpenters' unions and contractors, or paragraphs 7-9. The additional allegations of the second cause of action were as follows:

13.

"During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be bypassed for work assignments. During the same period, as aforesaid, Defendants, and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the union in retaliation for his political activities, and further threatened to deprive Plaintiff of his ability to earn a living as a carpenter.

"Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff." (IA. 9-10).

14.

"Defendants, and each of them, intentionally caused, or recklessly disregarded the probability that said conduct would cause Plaintiff to suffer grievous mental and emotional distress as well as great physical damage to Plaintiff making him sick, sore and lame and causing Plaintiff a nervous breakdown requiring Plaintiff to be hospitalized." (IA. 10).

The prayers for compensatory and punitive damages in paragraphs 15 and 16 respectively repeated *in haec verba* paragraphs 10 and 11. (IA. 10-11).

The third cause of action realleged the first six paragraphs of the first cause of action and alleged that Hill was a dues paying member and a third party beneficiary of the collective bargaining agreement that defendants breached the Agreement by failing to dispatch him in accordance with the Agreement and claimed general damages just as in paragraph 10; no punitive damages were sought on this contract claim. (IA. 11-13).

The fourth cause of action realleged paragraphs 1 through 6 of the first cause of action, claimed a breach of the agreement and further alleged that Hill joined Local 25 and paid dues and was entitled to receive the benefits of the hiring procedures under the Carpenter's Hiring Hall procedures and that defendants breached his membership agreement by failing to follow these procedures. He again claimed general damages as in paragraph 10, but no punitive damages. (IA. 13-15).

2. The Demurrer, The Rulings Thereon, and Further Pre-Trial Proceedings

On April 4, 1972 defendants filed a demurrer to the First Amended Complaint (IA. 16-18). With respect to the Second Cause of Action the demurrer stated:

"3. The Second Cause of Action set forth in the Complaint does not state facts sufficient to constitute a cause of action.

"4. The Court has no jurisdiction of the subject matter of the Second Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts." (IA. 17).

The demurrers to the other causes of action were identical.

On May 12, 1972, the Superior Court sustained the demurrer to the first, third and fourth causes of action of the first amended complaint, but it overruled the demurrer to the second cause of action, relying on *Alcon* v. *Anbro Engineering,* 2 Cal. 3d 493, a case in which no jurisdictional issue had been raised. (IA. 19).

Hill did not at any time appeal the Superior Court's ruling sustaining the demurrers to the first, third and fourth causes of action.

The defendants thereupon answered the second cause of action, setting forth denials and an affirmative defense which reiterated their jurisdictional objection. (IA. 20-21).

3. The Evidence at Trial.

We accept the Court of Appeal's statement[3] of the evidence which the plaintiff produced at trial:

At trial, Hill produced evidence from which the jury could conclude that Daley was business agent of Local 25, that Daley dispatched members of Local 25 to job sites on work assignments, that Hill was vice president of Local 25 during the period 1955-1968, that he had certain disputes and disagreements with Daley, that in January 1967, while he (Hill) was unemployed and on the out of work assignment list of Local 25, he was by-passed in assignment, that he complained to Daley and was told to go complain to Council, that he was a "jerk, knothead, idiot" and that he should go to another Local union, that he had other disputes with Daley concerning a credit union established by Local 25 and expenses incurred by Daley, that Daley dispatched other carpenters to work assignments ahead of him and he complained to Daley on the dispatching procedures, that Daley told him he would sit on the bench until "hell freezes over." Hill testified that other Union officials (Wilk and Fenwick) treated him the same way, that he told Daley he would file with the National Labor Relations Board (N.L.R.B.). Hill produced evidence that certain job site employers requested that he (Hill) be assigned to their jobs, but Local 25 assigned other union members.

Hill testified that he filed charges with Council about Daley's dispatching procedures but that the executive board of Council dismissed the charges. Hill admitted

[3] In order to conserve space we shall not set this lengthy statement out in the form of a quotation. The footnotes are our own.

that he was given some work assignments but he was also given other assignments where the work was nonexistent. On other assignments the type of work was unsatisfactory and he refused to accept it.

Hill testified that he ran for the office of President of Local 25 on the ground that Daley was a drunken fool, a disgrace to the union and corrupt and that he was discriminating in running the hiring hall. Hill testified that in 1967 he filed a charge with the N.L.R.B. on the Dinwiddie-Simpson construction job (Crocker Citizens Bank Building), alleging discriminatory assignment and that in November 1968, the N.L.R.B. found that there had been discrimination and the notice of discrimination from the N.L.R.B. which the N.L.R.B. required be posted "in a conspicuous place for 60 days" was buried by Daley on the window of one of the inner office where nobody would see it.

Hill testified that he and Daley never engaged in any fight or struck any blows but that on one occasion Daley invited him to "go out in the street and fight." The invitation was apparently not accepted. Hill called Daley as an adverse witness and examined him at great length as to his work assignment practices.

Hill also produced evidence that Daley prevented him from performing his official duties as vice president of the union, that Daley would not let him preside in the absence of the President because Daley claimed that he (Hill) was inadequate, that Daley ridiculed him and insulted him before other union members, that Daley urged him to leave the union, that Daley threatened him, that Daley threatened to starve him by refusing work assignments, that Daley fabricated a dispatch slip in order to place Hill's name

at the bottom of the out-of-work list from which assignments were made, that Daley interfered with his unemployment insurance benefits by telling the state agency that Hill had refused work assignments, that Daley would assign him to jobs which he was not qualified for and "just can't handle" which was contrary to union rules and regulations which allowed members to classify themselves regarding their work capabilities, that Daley refused to honor employers' specific requests for Hill, that he was threatened and intimidated because he filed charges with the N.L.R.B., that an agent of Council told 250 union members ". . . a brother ran down to the [N.L.R.B.] and there's no brother going to extract money from this Union and stay in it," that Daley dispatched him to short jobs only—the Ruane Job, 35 hours; the Burke job, 0 hours; the Weymouth-Crowell Job, 2 days; the Spear Job, 2 days—during which period there were 108 job opportunities on which other members were assigned, that Daley fabricated a dispatch of Hill to the Steel Form Company job which Hill allegedly refused, when in reality Hill received no such assignment. This was done in order to place Hill's name at the bottom of the job assignment list.

Hill claims that the totality of this evidence "constitutes an intentional infliction of severe emotional distress." Hill produced medical evidence regarding his alleged damages.[4] (Pet. A. 6-8).

[4] However, Hill's own medical witness, Dr. DeJohn, testified that there was no record in Hill's medical reports or history of work problems and that all the factors including work, diet, heavy drinking and smoking contributed to his symptoms. [Rep. Tr. pp. 1855-1866.] He testified that Hill stated in his history that he had never seen a psychiatrist [Rep. Tr. p. 1871], but testified that based on the report of a Dr. Thompson (who examined Hill earlier on an industrial injury case) (Def. Ex. X), a psychiatrist did diagnose Hill as suffering from "hypochondria". [Rep. Tr. pp. 1871-1872.] He testified that it was Hill's decision to be hospitalized [Rep. Tr. p. 1882], and that based on the records Hill was a heavy drinker, smoked heavily, took stimulants that caused his problem and there was nothing in his records relating to work problems. [Rep. Tr. pp. 1885-1887.]

The Court of Appeal also said:

The defendants produced substantial evidence[5] that employers did not request or want Hill on various jobs, that Hill had refused to work on various jobs, that Hill talked too much on the job, that he interfered with the work on various jobs, that Hill called Daley a drunken bum and then the two often drank and played poker together.

Wilk testified that he frequently drank with Hill and Daley, that he offered Hill various work assignments which Hill refused, that Hill called him a "dumb Polack" and would blow smoke in his face. (Pet. A. 9).

* * *

The dominant feature of the trial was plaintiff's effort to prove that Hill had been discriminated against in the operation of the union's hiring hall procedures because of Daley's animosity toward him, growing out of their intraunion political rivalry. To that end, plaintiff conducted an elaborate investigation into the operation of the hiring hall. In his opening statement to the jury Hill's attorney described Local 25's dispatching procedure in great detail and outlined that

[5] For example, Leo Poundstone testified that he was a construction superintendent and that in January or February 1969, Hill came to a job site and asked him why he was not hiring from the out-of-work list of Local 25; that he told Hill to leave the job site and Hill said to him "I don't know how a son of a bitch like you lives without getting shot". (IIIA. 580-585).

Hill intended to prove that he was discriminated against concerning dispatching of jobs, being dispatched to inferior jobs while other members of the union were allowed to "sneak in", and that he was sent on short jobs. (IA. 77-88, 91-93). He also discussed the Dinwiddy-Simpson job and reviewed the proceedings before the Labor Board.

Hill called Ken Scott, the current business agent of Local 25, to give an extensive description of the dispatching procedures of the hiring hall, including signing in, dispatching "sneak ins", requests, rehires, and job transfers. Scott also testified concerning the types of documents used by Local 25 on job referrals, out-of-work lists, and request forms. Many were put into evidence as exhibits. (Rep. Tr. pp. 244-290). On redirect, Scott was again questioned on procedures concerning signing lists, "sneak ins", rejecting referrals and staffing when a carpenter who was referred refuses a job. (Rep. Tr. pp. 430-442). Hill also called the defendant Daley. He was questioned at length regarding the hiring procedures of Local 25 concerning the out-of-work list, the referral system, the picking up of less than 16 hours of work, the signing of the out-of-work list, the stamping if a carpenter refused a dispatch on two jobs. (IIA. 274-288).

There was an enormous amount of evidence concerning the general pattern of the operation of the hiring hall. Hill had Daley select random names of carpenters on the out-of-work list to compare whether such carpenters' dispatch was dispatch by request or by some form of discrimination. The random names were selected on no relationship to Hill's claim. (IIA. 288-361, 371-395). Hill introduced exhibits involving dispatch slips and reviewed the requests and out-of-work

lists with Daley and specified individual carpenters. The out-of-work lists contained hundreds of names of carpenters and Hill would name carpenters who were dispatched without regard to any acts of discrimination. (IIIA. 401-547). He attempted to show that there was an over-all pattern of discrimination and in effect was putting the Local 25 dispatching procedures on trial and was not specifically limited to testimony as to individual acts of discrimination against Hill. (*Id.*).

Hill's attorney testified (by interrogating himself) regarding out-of-work records that he had examined for 1967, 1968 and 1969 (IIA. 204-208, Rep. Tr. 1102-09).

Hill introduced 102 Exhibits of which the following related directly to the employment practices of Local 25 and involved the overall dispatching procedures of the union. Most of the Exhibits did not directly involve Hill, but were the basis for his counsel's argument to the jury that Local 25 was engaged in a practice of job discrimination involving many carpenters and to urge it to award damages (particularly punitive damages) to punish the union for its overall hiring practices. The Exhibits referring to general employment practices are the following:

Exhibits 1, 2, 3, 4, 5, 7, 8, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 80, 82, 83, 84, 85, 95, 96, 98 and 99.

Many of the numbered exhibits actually contained dozens of separate documents; samples of these exhibits are reproduced in Vol. IV of the Appendix in order that the Court may appreciate the nature of the case plaintiff presented to the jury.

Plaintiff introduced into evidence, in support of his demand for punitive damages, forms submitted by the defendant unions to the Department of Labor showing their financial condition (LM-2). With respect to Local 25 the form placed in evidence was that for the fiscal year July 1, 1971 to June 30, 1972, which showed a gross income of $289,490.00. This income consisted primarily of dues from members in the amount of $229,379.00. The cash disbursements for the same fiscal year for Local 25 were $311,363.00. The cash disbursements consisted of per capita tax, salaries, expenses of officers, supplies, operation of the union office and other purposes. There was a *net deficit* for the fiscal year in the amount of $21,873.00. Local 25 showed fixed assets in the amount of $410,942.00. The primary asset is the union building, valued at $306,374.00.

The LM-2 of the District Council was that for the fiscal year July 1, 1969 to June 30, 1970. It showed total cash receipts in the amount of $457,361.00 of which $341,067.00 was membership dues. The District Council disbursed $401,613.00 leaving a net income for the fiscal year of $55,648.00. It had total assets of $552,046.00. The primary assets are the union building, valued at $381,287.00, and cash in the amount of $169,032.00.

4. The Court's Instructions to the Jury, Its Verdict and the Judgment Thereon.

Even as the trial related primarily to discrimination in the operation of the hiring hall, so did the Court's instructions. The following are pertinent to the present case:

> "In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all

> of the facts necessary to prove the following issues:
>
> 1. The defendants intentionally and by outrageous conduct inflicted upon plaintiff severe emotional distress
>
> 2. That the said conduct of the defendants was the proximate cause of injury and damage to the plaintiff and
>
> 3. The nature and extent of the injuries and damages claimed to have been so suffered." (I A. 34.)
>
> * * *
>
> "There has been received in evidence the fact that Plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.
>
> The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.
>
> The Plaintiff in this action charges the intentional inflication [sic] of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages. The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage." (*Id.* 41-42.)
>
> * * *
>
> "If you find that Plaintiff has suffered actual damage as a proximate result of the acts of Defendants on which you base your finding of liability, you may in your sole discretion award additional damages against Defendants as punitive or

exemplary damages, for sake of example and by way of punishing Defendants if, and only if, you find by a preponderance of the evidence that said Defendants have been guilty of oppression or actual malice.

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound is [sic] discretion, exercised without passion or prejudice." (*Id.* 48-49.)

* * *

The Court refused to give the following instructions requested by the defendants:

"In determining whether the Plaintiff has satisfied the burden of proof regarding liability of any defendants in this case, you are not to consider any evidence regarding discrimination concerning employment opportunities or hiring either on the basis of the general dispatching procedures of the Defendants Carpenters Union Local 25, or its business agents, or regarding any operation of the dispatching procedures concerning the Plaintiff." (*Id.* 60.)

* * *

"In determining whether the Plaintiff has satisfied the burden of proof, you are not to consider the general procedures and practices of the hiring hall of Carpenters Union Local 25, or any of its business agents. The only evidence you are to consider are evidence relating to the Plaintiffs individually regarding the alleged act of discrimination concerning his employment." (*Id.* 61.)

The jury returned a general verdict in the amount of $7500 general damages and $175,000 punitive damages against the present petitioners, Local 25, the District Council, and Daley. It found in favor of two of

the remaining individual defendants.[6] The Court entered judgment on the verdict (I A. 68-69).

B. Proceedings in the California Appellate Courts.

Defendants appealed to the California Court of Appeal. Putting aside all other grounds, the Court of Appeal sustained appellants' position "that the federal government has preempted this field and the state courts have no jurisdiction, that jurisdiction to right the alleged wrong is vested in the N.L.R.B." (Pet. A-9). The Court "regard[ed] four cases as controlling: *San Diego Unions* v. *Garmon,* 359 U.S. 236; *Plumbers' Union* v. *Borden,* 373 U.S. 690; *Iron Workers* v. *Perko,* 373 U.S. 701; and *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274." (*Id.*) The Court drew from these cases the principle that the "'crux' of the action," * * * "the *conduct* on which the suit is centered, whether described in terms of tort or contract" determines whether the suit is within the jurisdiction of the state court (Pet. A-21, A-22, quoting *Borden,* 373 U.S. at 697-698, this Court's emphasis). The Court of Appeals determined that despite other evidence adduced by petitioner,[7] "the 'crux' of the action concerned Hill's employment. The *conduct* on which the suit is

---

[6] The United Brotherhood and two individual defendants had previously been dropped from the case. The unidentified employers referred to in the complaint were never served.

[7] "It is true that in the case at bar that Hill complained of incidental conduct which might not directly involve his employment, such as the fact that Daley used abusive language, called Hill foul names and that Daley invited him outside on one occasion for a fight. Also that Daley advised the state unemployment insurance people that Hill had refused work assignments and was therefore not eligible for unemployment benefits. It is undoubtedly true that there was bitter animosity between the two men which was reflected in a variety of ways." (A-21)

'centered' is conduct which is within the Board's exclusive primary jurisdiction to apply federal standards" (A-22, emphasis in original). The Court added:

> "The fact that in the case at bar Hill sought damages for mental anguish should not change the result here any more than such a claim for mental anguish changed the result in *Borden, supra* and *Lockridge, supra.* It is the 'crux' of the causes of action, the 'conduct' which is complained of which controls whether federal or state courts have jurisdiction, not the type of damage which is caused by such conduct.
>
> In the case at bar we are not required to speculate whether or not the wrongs which Hill complains of were 'arguably' within the jurisdiction of the N.L.R.B. Here the N.L.R.B. did in fact assume jurisdiction, it did find that Local 25 was guilty of unfair labor practices in making work assignments of Hill in the Dinwiddy-Simpson job for the construction of the 'Crocker Citizens Bank' building and awarded Hill $2,517 back wages for discriminating conduct with reference to that job. Hill filed other charges of unfair labor practices with the N.L.R.B. but voluntarily withdrew them.
>
> We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of $2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury. Such an approach might have been permissible under *Weber* v. *Anheuser-Busch, Inc.,* [348 U.S. 468] but that concept was repudiated by *Local No. 207* v. *Perko, supra,* wherein the U. S. Supreme Court said if the union conduct is 'arguably' within the jurisdiction of the N.L.R.B., state jurisdiction is pre-

> empted even though state jurisdiction may award greater relief than would be awarded by the N.L.R.B.
>
> Here there is no doubt in our view that the 'crux' of the conduct of the defendants complained of by Hill related directly or indirectly to his employment and work assignments. The key allegation of his complaint was that the defendants 'made repeated oral threats to the effect that as long as they controlled job dispatching procedures that [Hill] would be *and he was given* inferior 'assignments and be bypassed for work assignments.' (Emphasis ours.) That he was threatened with actual and *de facto* expulsion in 'retaliation for his political activities' and defendants 'further threatened to deprive [Hill] of his ability to earn a living as a carpenter.' That 'as a proximate result of the intentional and wrongful *discriminatory conduct'* (emphasis ours) Hill suffered certain damages." (Pet. A-23-A-24)

The Court also fully understood the importance of a nationally uniform remedial policy:

> "In both *Borden* and *Lockridge* the plaintiff sought damages for emotional and mental distress. As we have already stated, in each instance the U.S. Supreme Court in effect held that that was not determinative, that the determinative factor was the 'areas of conduct' not the type of damage that is inflicted as a proximate result of the conduct. The very purpose of having one uniform national policy administered by a single specially constituted tribunal would be completely frustrated and defeated if it were legally permissible for juries in the fifty different state tribunals to award different amounts of damage for conduct which is essentially within the jurisdiction of the N.L.R.B. A labor union could be completely wiped out financially by such awards resulting in substan-

tial detriment to other innocent union members whose livelihood depends upon continued union representation. A collusive action with such a result is not beyond the realm of possibility. If the award of damages by the N.L.R.B. is inadequate for any reason, the remedy lies with the federal government, not by resort to the tribunals of the fifty different states. Hill seeks to distinguish *Borden, supra,* and *Perko, supra,* on the ground that each case involved a single act of unfair labor practice rather than a course of conduct which is what is involved in the case at bar. We regard this as a difference without legally significant distinction. We are cited to no authority that holds that N.L.R.B. jurisdiction is limited to single acts of unfair labor practice and that it has no jurisdiction of a course of conduct.

For purposes of illustration only we note that under section 187 of the Labor Management Act (29 U.S.C.A.) Congress did expressly reserve to the injured party causes of action for damages in U.S. District Court 'or in any other court having jurisdiction of the parties' resulting from an unfair labor practice under section 158(b)(4) (secondary boycotts). If the Congress had intended to allow the fifty different states power to award damages for the type of action arising out of the unfair labor practices alleged in the case at bar, it would have been an extremely simple matter to enlarge the provision of section 187 to encompass such actions." (Pet. A-25-A-26).

The Court refused to pass on the allegations raised in the three other causes of action: "Since Hill does not appeal from the judgment we will treat the legal problems as if only cause of action II had been filed." (Pet. A-2).

Having "conclude[d] that the trial court herein was without jurisdiction and that jurisdiction was vested

in the N.L.R.B.", the Court reversed the judgment of the Superior Court "with instructions to render judgment for the defendants and dismiss the action" (Pet. A-28). The Supreme Court of California denied plaintiff's petition for hearing (Pet. B-1).

THE JUDGMENT BELOW IS NOT FINAL

The State Court of Appeal reversed the judgment in plaintiff's favor "with instructions to render judgment for the defendants and dismiss the action" (Pet. A. 28). The California Supreme Court denied hearing. It would appear on its face, therefore, that the judgment of the state court is final, and that this Court's jurisdiction under 28 U.S.C. § 1257(3) was properly invoked. At one time, this Court took the view that finality was to be determined solely from the face of the judgment, *Houston* v. *Moore,* 3 Wheat. 433; *Bruce* v. *Tobin,* 245 U.S. 18; see Stern & Gressman, *Supreme Court Practice* (Fourth ed., 1969), p. 94. Now, however, this Court examines "both the judgment and the opinion as well as other circumstances which may be pertinent" in resolving the issue of finality" (*Gospel Army* v. *Los Angeles,* 331 U.S. 543, 548). In the present case there are pertinent other circumstances, for petitioner has advised this Court that the litigation in the state courts was not terminated by the Supreme Court's denial of a hearing. In his petition for certiorari he said:

> "Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition." (Pet. 10, n. 4.)

This statement is repeated *in haec verba* in his brief on the merits (P. Br. 12, n. 7). Petitioner does not

explain the nature of the "continuing dispute", but this clearly appears from the position that he took in his Petition for Hearing in the Supreme Court of California.

Petitioner there contended that the Court of Appeal had erred in ruling "that the judgment on Petitioner's second cause of action was a judgment as well on the other causes of action,"[8] so that "the fact is inescapable that the decision of the Court of Appeal is void and that the case is still pending in the trial court and will so remain until a proper judgment is entered."[9] In the Supreme Court of California he presented alternatives for eliminating this supposed jurisdictional defect, culminating in the offer that he would be prepared to stipulate that the record on appeal be treated as a petition for mandamus and the Supreme Court would be able to reach the merits, "provided that the entire case, including the order sustaining the demurrer to his first, third and fourth causes of action, were to be deemed before the Court for full review."[10] Petitioner then informed the Court of "the consequences if this Court does not grant hearing in order to remedy this jurisdictional defect":[11]

> "Although *the Court of Appeal's decision is in fact a nullity,* remittitur will issue and Respondents will seek entry of judgment as mandated by the decision. (Opinion, p. 30.) *Petitioner will resist entry of any such judgment* and will seek entry of a single appealable judgment on

[8] Plaintiff's Petition for Hearing in the Supreme Court of California, p. 10.

[9] *Id.*, pp. 10-11.

[10] *Id.*, p. 12.

[11] Id.

> all causes of action, in order to secure review of the ruling on the demurrer. *That much is certain.* It cannot be predicted, of course, what the trial court will do in the face of such conflicting demands, nor can it be predicted precisely what the losing party will do, but it would not be unreasonable to expect a flurry of petitions for extraordinary relief, directed not only to the Court of Appeal but to this Court. It is difficult to believe that Petitioner's position will not ultimately prevail and his right to review of the ruling on the demurrer not be recognized, but such additional proceedings would be onerous to all parties and wasteful of the time and efforts of the Courts."[12]

Thus, petitioner put the Supreme Court of California, and of course the defendants, on notice that if that court denied him a hearing he would resist the entry of judgment in the trial court and would vigorously litigate his right to review the orders sustaining the demurrer to the three other causes of action arising out of the dispute between plaintiff and the defendants. And, by his statement that the "controversy" is "continuing", petitioner has put this Court on notice that it is "certain" that he will resist the entry of judgment, and that there will be protracted "additional proceedings" in the state courts. This is fair enough, for while it seems clear to us that petitioner's efforts in the state court would and should be unsuccessful, neither we, nor this Court, can keep him from trying.

To be sure, if petitioner had chosen to discontinue the controversy as to the status of his first, third and fourth causes of action, and had accepted the decisions

[12] *Id.*, emphasis added.

of the California state courts as the final disposition of his action, no jurisdictional obstacle to this Court's review would exist.[13] But when petitioner elected to retain the other three strings to his bow, he destroyed the finality of the judgment, which he must establish in order to invoke and maintain this Court's jurisdiction under 28 U.S.C. § 1257(3). Interestingly, petitioner did not, either in his Petition or his brief, assert that the judgment is, in fact, final, although he "of course, has the burden of affirmatively establishing this Court's jurisdiction" (*Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 70-71; *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651). And while, if nothing appeared to put finality in doubt, the invocation of jurisdiction with citation to 28 U.S.C. § 1257(3) would be taken as a sufficient representation that the judgment below is final, petitioner's own reservation of a right to continue the litigation in the State courts would nullify such a claim even if it had been made expressly.[14]

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[13] Of course, if petitioner had said nothing, and had, after a decision by this Court, sought to reinstate the three other causes of action, he would have been met not only with our objections under state law, but also the contention that he is estopped from reopening the case by the representation that the judgment is final which would have been implicit in his unqualified invocation of this Court's jurisdiction.

[14] In *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, the Court accepted the petitioner's "concession that his case rests upon his federal claim and nothing more" and on that basis determined that despite the Georgia Supreme Court's remand for other proceedings, the judgment was final (*id.* at 382). See also *Mills* v. *Alabama,* 384 U.S. 214, 217-18. The present case presents the converse situation. Whereas on the face of the judgment of the Court of Appeal, the proceedings in the state court are over, what petitioner has told this Court makes plain that far more "remains to be done [than] the mechanical entry of judgment by the trial court" (345 U.S. at 382).

It cannot consistently be maintained 1) that a state court judgment is final, 2) that "the case is still pending in the trial court" and 3) that the judgment of which review on the merits is sought is a "nullity" for procedural reasons. Moreover, in *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67-68, Mr. Justice Frankfurter, while acknowledging that "[n]o self-enforcing formula defining when a judgment is 'final' can be devised", articulated certain "[t]ests" which "are helpful in giving direction and emphasis to decision from case to case" and which plainly govern this one:

> "Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce* v. *Tobin,* 245 U.S. 18; *Martinez* v. *International Banking Corp.,* 220 U.S. 214, 223; *Mississippi Central R. Co.* v. *Smith,* 295 U.S. 718. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. *Board of Commissioners* v. *Lucas,* 93 U.S. 108; *Mower* v. *Fletcher,* 114 U.S. 127."

Here, according to plaintiff, more than a "few loose ends remain to be tied up". While we believe—and shall insist in the state courts—that the defendants are entitled to an entry of judgment in their favor, there is nothing that we could do to prevent plaintiff from pursuing his announced intention to resist the entry of such judgment. Thus, it cannot be said that the entry of judgment on the Court of Appeal's mandate would be "nothing more than a ministerial act."

Indeed, plaintiff says quite the opposite: it "is certain" that he will resist "entry of any such judgment * * *" (see pp. 22-23 *supra*) and thereupon a new round of litigation will commence.

We recognize that in recent years this Court, while adhering to the basic principles of the finality requirement, has subjected it to certain exceptions, which were categorized in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469.

What was said in *Cox,* however, makes it even more plain than it had been before, that compliance with the finality requirement cannot be excused in the present case. The Court there said:

> "There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, *these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date,* and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice, *Radio Station WOW, Inc.* v. *Johnson, supra,* at 124, as well as precipitate interference with state litigation." (*Cox Broadcasting Corp.,* 420 U.S. at 477-478, footnote omitted, emphasis added.)

Petitioner has not asserted that he fits into any of these categories. Indeed, an examination of the proceedings which plaintiff contemplates shows that "the remaining litigation may raise other federal questions that may later come here" so that "to allow review of an

intermediate adjudication would offend the decisive objection to fragmentary reviews" (see *Radio Station WOW* v. *Johnson,* 326 U.S. 100, 127, approved on this point in *North Dakota Pharmacy Bd.* v. *Snyders' Stores,* 414 U.S. 156, 163). For the very issue which petitioner intends to raise in the state courts if he successfully resists the entry of judgment is that the trial court erred as a matter of federal law in dismissing his other causes of action.

If this Court affirms, leaving the judgment of the Court of Appeal intact, petitioner would resist entry of judgment thereon. His object, of course, is to revive the federal questions which were decided adversely to him when the demurrers on counts 1, 3 and 4 were sustained. If the trial court adhered to its original ruling, he would then pursue that federal question on appeal through the California courts, and, if he failed there, would seek to return to this Court. Moreover, if any of those three claims were reinstated for trial, the federal jurisdictional issues would survive until a judgment on the merits, and the additional proceedings could well give rise to further federal questions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The allegations made in the plaintiff's second cause of action, the cause that went to the jury, and that resulted in a general verdict in his favor, sound in the state tort law of intentional infliction of emotional distress. But the evidence adduced by the plaintiff at trial focussed on alleged discrimination in job referrals from the union hiring hall against the plaintiff and other union members who opposed the incumbent officers, and on threats thereof. See pp. 8 to 13, *supra*. As the National Labor Relations Board demonstrates in its brief *amicus curiae* and appendix thereto the plaintiff's presentation in its major particulars was indistinguishable from any of scores of presentations made by the Board's General Counsel in § 8(b)(2) proceedings before that agency. Indeed, the plaintiff to prove his state tort case relied in part on a Board decision, stemming from a charge he had filed, holding that he had been discriminated against in referrals to the Dinwiddy-Simpson job in violation of § 8(b)(2).

In *San Diego Unions* v. *Garmon,* 359 U.S. 236, 244 this Court held

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."

And, in *Plumbers Union* v. *Borden,* 373 U.S. 690, the Court applied the *Garmon* rule in holding that Texas' authority to entertain a suit brought pursuant to Texas tort law for "wilful, malicious and discriminatory interference" with the right to contract on the theory

that the defendant union had refused to refer Borden to a job because of union membership considerations, was preempted.

I.

In Part I of this brief we show that the *Borden* case is this case. Here too, "the conduct called into question" (373 U.S. at 694) was union discrimination in the operation of a hiring hall, and the alleged discrimination was based on union "membership" in the broad sense of that term established in *Radio Officers* v. *Labor Board,* 347 U.S. 17, 39-42, and followed in *Borden.*

We show also that this case is not within the *Machinists* v. *Gonzales,* 356 U.S. 617 exception to *Garmon.* In 1947 Congress expressly and deliberately left unregulated the internal affairs of unions. Union interference with employment rights, on the other hand, was minutely regulated in § 8(b)(2). Following the line of demarcation drawn by Congress, this Court has distinguished between cases the crux of which is alleged job discrimination—as to which the Board does have jurisdiction and the state courts therefore do not—and cases such as *Gonzales*—which focus on the loss of membership rights which the Board can not regulate and as to which the states do retain jurisdiction.

Petitioner also relies on *Linn* v. *Plant Guard Workers,* 383 U.S. 53. But, as we demonstrate, that case undermines his position. While petitioner argues that the states have jurisdiction to award remedies other than those provided by federal law, *Linn* accepts the predicate of *Borden* and *Garmon* that it is the nature of the conduct in question that determines whether the state's jurisdiction is preempted. The

Linn Court did not mention the nature of the state relief available until it had completed its analysis of whether state regulation of libelous speech would be inconsistent with the federal labor policy. And, while petitioner argues that the NLRA does not preempt state tort law of general application, *Linn* holds that the states may not enforce their defamation law against non-malicious libels uttered in the course of a labor dispute.

Petitioner would now have it that state court jurisdiction may be affirmed on the basis of the exceptions to *Garmon* for actions based on the duty of fair representation or on the Labor Management Reporting and Disclosure Act. We conclude Point I by establishing that the single question presented deals only with petitioner's claim that his state tort claim was not preempted and that his present reliance on these two federal claims is not fairly comprised within that question. Nor has petitioner met the requirements of Rule 23(1)(f) which require him to state when and how he raised the fair representation and LMRDA issues below or shown that the disposition below did not rest on an adequate state ground. Finally we note that this case does not involve an abstract debate as to whether petitioner's bare pleadings were sufficient. A trial has been had and the question is whether these two issues were presented to the jury after defendant was put on notice that petitioner was relying on them. On the record here that question can only be answered in the negative. Plaintiff's effort to reverse the jury's verdict on distinct theories which were not tried and on which it was not instructed is wholly impermissible.

II.

Petitioner asks that this case be decided on the basis of *Teamsters Union* v. *Morton,* 377 U.S. 252, rather than on the basis of *Garmon.* We believe that *Garmon* should be followed, because it accords with Congressional judgments made in 1935 and 1947, and because the rule there stated was consciously ratified by Congress in 1959. In any event, we show that petitioner would not be entitled to prevail even under *Morton.*

Morton establishes that state laws which conflict with the federal remedial scheme may not stand, any more than can state statutes which conflict with the NLRA's substantive provisions. The Court held that since Congress allowed only compensatory damages for violations of § 303 (identical to violations of § 8(b)(4)) punitive damages could not be awarded for violation of state law by the same conduct (*id.* at 260-261). That holding controls this case. The jury was invited to determine liability and/or assess damages on the basis of the precise unfair labor practice which the NLRB had already remedied by a back pay award in excess of $2500 (together with the usual cease and desist and notice posting requirements). The jury was instructed that it could award damages supplementing that back pay award for that conduct although, as the instruction clearly stated, the Board was without authority to award damages for medical expenses, pain and suffering or punitive damages. It is such supplementation of federal remedies for unfair labor practices by state remedies, including punitive damages, for exactly the same conduct, which *Morton* held to be an impermissible conflict. The policy, embodied in § 10(c), that there should be no punitive damages for violations of

§ 8, is older than and equally strong as, the identical policy embodied in § 303.

We trace the decisions which elaborate the § 10(c) policy, the fullest of which is *Republic Steel Corp.* v. *Labor Board,* 311 U.S. 7, 10-12. The Court there said in part:

> ". . . We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.
>
> * * *
>
> "In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

What Congress has forbidden the Board from doing, the States may not do either.

ARGUMENT

I. THE STATE COURT WAS WITHOUT JURISDICTION OVER PETITIONER'S CLAIM BASED ON DISCRIMINATION AGAINST HIM IN THE OPERATION OF A HIRING HALL.

A. Plumbers' Union v. Borden, 373 U.S. 690, Establishes that This Case Is Beyond State Jurisdiction Because the Union's Conduct Is "Subject to Labor Board Cognizance".

The jury was permitted, indeed invited, to award damages to petitioner on the ground that there had been union discrimination against him in the operation of the hiring hall, due to his opposition to Daley, the union's business agent, and Daley's policies. As the court below held, the state courts are without jurisdiction to award damages based on such conduct, which is clearly within the competence of the National Labor Relations Board to redress. *Plumbers' Union* v. *Borden,* 373 U.S. 690 ("Borden") is directly in point and dispositive.

In *Borden* the plaintiff was a member of the Plumbers Local in Dallas, Texas. He obtained an opportunity to work for a construction company, but was refused a job referral from the local union.

After the plaintiff was refused the job referral, he filed suit against the Local Union and the International Union seeking damages under Texas state law for the refusal to dispatch him and alleged that the acts of the Plumbers Union constituted "willful, malicious and discriminatory interference with his right to contract and pursue a lawful occupation". The Texas court allowed the case to go to the jury, which found that there was job discrimination and awarded damages for loss of earnings, mental suffering and punitive

damages. The Texas court disallowed the recovery for mental anguish and ordered a remittitur on punitive damages that were in excess of the amount of actual damages. The Texas Appellate Court affirmed the judgment.

This Court reversed. In his opinion for the Court Mr. Justice Harlan first summarized the governing principle:

> "This court held in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction, the Court stated, is essential 'if the danger of state interference with national policy is to be averted,' 359 U. S., at 245, and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." [15]

Justice Harlan then undertook this "first inquiry" which is identical to that to be undertaken in the present case:

> "The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a

[15] *Id.*, at 693-694, footnote omitted.

particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly "arguable" that the union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3). See, *e. g., Radio Officers* v. *Labor Board,* 347 U. S. 17; *Local 568, Hotel Employees,* 141 N.L.R.B. 29; *International Union of Operating Engineers, Local 524 A-B,* 141 N.L.R.B. No. 57. As established in the *Radio Officers* case, the 'membership' referred to in § 8(a)(3) and thus incorporated in § 8(b)(2) is broad enough to embrace participation in union activities and maintenance of good standing as well as mere adhesion to a labor organization. 347 U.S., at 39-42. And there is a substantial possibility in this case that Borden's failure to live up to the internal rule prohibiting the solicitation of work from any contractor was precisely the reason why clearance was denied. Indeed this may well have been the meaning of the business agent's remark, testified to by Borden himself, that 'you have come in here wrong, you have come in here with a job in your pocket.'

It may also be reasonably contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7. This Court has held that hiring-hall practices do not necessarily violate the provisions of federal law, *Teamsters Local* v. *Labor Board,* 365 U.S. 667,

and the Board's appraisal of the conflicting testimony might have led it to conclude that the refusal to refer was due only to the respondent's efforts to circumvent a lawful hiring-hall arrangement rather than to *his* engaging in protected activities. The problems inherent in the operation of union hiring halls are difficult and complex, see Rothman, The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va. L. Rev. 871, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency.

"We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." [16]

The *Borden* case is this case. Here too, "the conduct called into question" (373 U.S. at 694) was union discrimination in the operation of a hiring hall, and the alleged discrimination was based on union "membership" in the broad sense of that term established in *Radio Officers* v. *Labor Board,* 347 U.S. 17, 39-42, and followed in *Borden.* Indeed, in this case not only is the union's conduct "reasonably asserted to be subject to Labor Board cognizance" (373 U.S. at 694), it was *demonstrated* to be subject to Board cognizance by petitioner's successful filing of a charge with the Board arising out of the discriminatory failure to

[16] *Id.* at 694-696, footnotes omitted, emphasis in original. In a separate part of the opinion Mr. Justice Harlan rejected Borden's contention that the state courts had jurisdiction under *Machinists* v. *Gonzales,* 356 U.S. 617. The same contention is made by petitioner here, and this aspect of the *Borden* holding is discussed at pp. 41-51 *infra.*

refer him to the Dinwiddie-Simpson job; the jury was actually instructed, over defendants' objection, that the Board had entered an award in plaintiff's favor covering the wages he would have earned on that job. See p. 15, *supra.*

In discussing whether this case comes within the *Garmon* principle (as opposed to one of the exceptions acknowledged therein, see pp. 41-60 *infra*), petitioner does not discuss the majority opinion in *Borden* at all. And while his discussion of the *Garmon* principle is lengthy, he attempts to differentiate the facts of this case from *Borden* in only two ways.

He argues first: "To begin with, it is clear beyond cavil that the misconduct herein was not protected under Section 7 of the Labor-Management Relations Act (P. Br. 41). This statement assumes the answer to the issue which was most vigorously and extensively litigated at the trial, whether there was "misconduct" in the operation of the hiring hall and if there was, its extent. The jury determined the "misconduct" issue against the defendants in this case; that was the result in *Borden* as well. But Mr. Justice Harlan did not indulge in the circular reasoning of giving weight to the result reached by the jury in determining whether the jury was authorized to decide the question in the first place. *Borden* squarely holds that since the Board might find the union operation to be "protected concerted activity within the meaning of § 7," and particularly because of the difficulty and complexity of the problems inherent in assessing the operation of a hiring hall, "initial competence to adjudicate such matters" must be left "to a single expert federal agency" (373 U.S. 695-696). This case is identical to *Borden* in this particular; the lengthy trial

of this issue only confirms Justice Harlan's characterization, "difficult and complex". On this ground alone, the verdict of the jury may not stand.

Plaintiff next misstates the facts in order to avoid the "prohibited" or "arguably prohibited" branch of the *Garmon-Borden* analysis. For, he asserts: "It should be clear, moreover, that much of the misconduct, and perhaps the greater part of it, could hardly have been in mere reprisal for Petitioner's political opposition to Daley" (P. Br. 50). This is belied by petitioner's own Statement of the Case: "Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control." (*Id.* 6). The remainder of the respective paragraphs at P. Br. 50-51 and *id.* 6 are likewise totally at odds. And even if one could read the record to show that Daley's hostility to Hill was purely personal, despite the way the case was tried, it is incontrovertible that the jury was permitted to find the respondents' liable if it found that Hill's "opposition to Daley and Daley's policies" (P. Br. 50-51) was the basis of discrimination against him in the operation of the hiring hall. Thus, the general verdict may have been for conduct which was clearly subject to the jurisdiction of the Board. It follows that petitioner's observation that discrimination in hiring was not the only *form* of "misconduct" with which Hill charged Daley, and on theory of *respondeat superior* principles, the union (P. Br. 39-49, 50), avails him nothing, for it is settled that a general verdict may not stand if it *may have been based* on any factor which the jury was not entitled to consider. See, *e.g., Stromberg* v. *California,* 283 U.S. 359, 368; *New York Times*

v. *Sullivan,* 376 U.S. 254, 283; *Bachellar* v. *Maryland,* 397 U.S. 564, 570-571; *Letter Carriers* v. *Austin,* 418 U.S. 264, 281-282.

In sum, as the case went to the jury, the verdict could have been based in whole or in part on conduct identical to that in *Borden,* and the result reached in that case must be reached here as well.

There is moreover in this case a fact which was absent in *Borden,* and which renders it impossible for plaintiff to argue that the jury was not permitted to impose liability and damages on the basis of conduct which was prohibited by § 8 of the Act. For petitioner's case was directed *inter alia* to proving discrimination against him on the Dinwiddy-Simpson job, as to which the Labor Board had found that the union committed a violation of §§ 8(b)(1)(A) and 8(b)(2) by refusing to refer petitioner. To nail this point home, and to get the full benefit of the Board's finding, petitioner requested and obtained an instruction informing the jury that Hill had filed a charge with the Board, that he received an award covering the wages that he would have earned on the Dinwiddy-Simpson job, that the Board is empowered to render such awards to compensate for lost wages "where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws," and that the Board cannot grant "damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages," the additional award sought by plaintiff. (I A. 41-42, quoted at p. 15, *supra*).

Since petitioner has already recovered over $2500 against Local 25 in a Labor Board proceeding on precisely this theory which he now challenges, this argu-

ment is subject to the familiar and manifestly just doctrine of preclusion against inconsistent positions.[17] Indeed, the argument impeaches the very verdict which petitioner is attempting to sustain, because at his insistence the jury was instructed that the

> "National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws." (IA. 42)

If that instruction was wrong and the Board was not empowered to so decide, the verdict cannot stand because both in determining liability and in assessing damages, the jury may have been influenced by the Board's determination of liability. That obviously was plaintiff's purpose in requesting the instruction. In any event, *Borden* demonstrates that the contention is wholly untenable. It is beyond legitimate dispute that "the conduct called into question" by petitioner's claim, as it went to the jury, "may reasonably be asserted to be subject to Labor Board cognizance" and that the state courts were therefore without jurisdiction (*Borden,* 373 U.S. at 694).

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[17] "A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey* (C.A. 3) 203 F.2d 510, 513.

See generally 1B Moore's *Federal Practice,* ¶ 0.405[8], pp. 765-773.

B. The "Peripheral Federal Concern" Exception Is Inapplicable.

Petitioner argues also that this case "is squarely within the exception for matters of only peripheral federal concern but vital local concern" (P. Br. 54, heading). In this connection he relies on *Machinists* v. *Gonzales,* 356 U.S. 617 ("Gonzales"), discussed at P. Br. 63-83, and *Linn* v. *Plant Guard Workers,* 383 U.S. 53 ("Linn"), discussed at P. Br 56-63.

1. Machinists v. Gonzales

The Court of Appeal held that this case was not within the *Gonzales* exception to *Garmon* but was governed by *Borden, Perko* and *Lockridge* (Pet. A. 27). The Court of Appeal was clearly right, in light of this Court's explanation of the critical difference between *Gonzales* and the subsequent cases.

The second major issue discussed and decided in *Borden* was the applicability of the *Gonzales* exception in a case where the gravamen of the plaintiff's action was the refusal to refer him out of a union hiring hall. Once again, it is hardly necessary to do more than quote the Court's opinion in *Borden.* Justice Harlan summarized the *Gonzales* facts by noting that the complainant there had been "expelled [from his union] in violation of his contractual rights and * * * was seeking restoration of membership [; h]e also sought consequential damages flowing from the expulsion, including loss of wages resulting from loss of employment and compensation for physical and mental suffering" (373 U.S. at 696). He then stated:

> "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on re-

lations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.

We need not now determine the extent to which the holding in *Garmon,* 359 U.S. 236, *supra,* qualified the principles declared in *Gonzales* with respect to jurisdiction to award consequential damages, for it is clear in any event that the present case does not come within the *Gonzales* rationale. The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (*Gonzales,* 356 U.S. at 618) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." (*Id.* at 697)

On the same day the Court also distinguished *Gonzales* in *Iron Workers* v. *Perko,* 373 U.S. 701. What the Court said with respect to Perko's case is applicable *in haec verba* to Hill's:

> "As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' * * *. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." (373 U.S. at 705.)

In *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, after reviewing *Gonzales, Borden* and *Perko* at length (*id.* at 294-296), the distinction was reaffirmed:

> "In sum, what distinguished *Gonzales* from *Borden* and *Perko* was that the former lawsuit 'was focused on purely internal union matters,' *Borden, supra,* at 697, a subject the National Labor Relations Act leaves principally to other processes of law." (*Id.* at 296.)

The Court pointed out that whereas in *Gonzales* potential interference with the federal regulatory scheme was "tangential and remote" because the case turned on the interpretation of the union constitution, in *Lockridge* "the possibility was real and immediate" because his case "turned upon the construction of the applicable union security clause, a matter as to which * * * federal concern is pervasive and its regulation complex" (403 U.S. at 296). The operation of a hiring hall is surely no less complex.

In light of the foregoing it is altogether extraordinary that petitioner should find it "obvious that *Borden, Perko* and *Lockridge* are hardly distinguishable from *Gonzales* on the basis that *Gonzales* focusses upon purely internal affairs while they do not, and that they touch upon employment relations while *Gonzales* does not" (P. Br. 67). That, as we have seen, is precisely the distinction which the Court did draw, and that line of demarcation follows the path Congress took in 1947.

The internal affairs of unions were expressly and deliberately left unregulated by the Taft-Hartley Act, as attested to by the proviso to § 8(b)(1)(A) to which the *Borden* opinion expressly drew attention, 373 U.S.

at 697, n. 8. Union interference with employment rights, on the other hand, was minutely regulated by § 8(b)(2) and thereby placed under the NLRB's aegis. Congress' purpose was to place unions under legal restraints comparable to those placed on employers in 1935 where, as is the case when a union has a voice in hire or discharge, Congress viewed the union position to be equivalent to that of an employer. The identity is made manifest by the language of § 8(b)(2), which incorporates § 8(a)(3). This Court's definitive statement as to § 8(b)(2)'s meaning is set out in *Radio Officers* v. *Labor Board,* 347 U.S. 17, 39-40, which as we have seen, was followed by the Court in *Borden.* Of particular importance is the following portion of the opinion:

> "But the scope of the phrase 'membership in any labor organization' is in issue here. Subject to limitations, we have held that phrase to include discrimination to discourage participation in union activities as well as to discourage adhesion to union membership.
>
> Similar principles govern the interpretation of union membership where encouragement is alleged. The policy of the Act is to *insulate employees' jobs from their organizational rights* [citing § 7 of the Act]. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to *join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.*" (*Id.* at 39-40, footnotes omitted, emphasis added.)

In complete disregard of the position he took at trial, where he relied on the Board law, Petitioner now argues:

> "[E]ven though the Board has interpreted the Act as authorizing it to reach [referral discrimination], and even though the bare language of the Act might provide some support for the Board's position, the legislative history does not. * * * Section 8(b)(2) was aimed essentially at the closed shop and to the extent that its terms seemed to go beyond prohibition of the closed shop, its proponents indicated only that the section was intended to reach union attempts to cause termination of an expelled member from a job he already possessed." (P.Br. 49-50.)

Petitioner's dramatic shift in position is wrong on the merits as well. His statement of the law is simply irreconcilable with this Court's interpretation of the term "membership" in *Radio Officers.*

The *Radio Officers* interpretation of § 8(b)(2) has, of course, been followed and the Board has, in innumerable cases, determined whether a union in its operation of a hiring hall has engaged in discrimination to encourage or discourage "membership" in this broad sense. See the cases cited and discussed in the NLRB Brief and the appendix thereto. It is difficult to imagine conduct more "plainly within the central aim of federal regulation" (*Garmon,* 359 U.S. at 244). We therefore think it would unnecessarily burden the Court for us to respond to petitioner's ill-disguised attack on *Radio Officers* (P. Br. 21-29), but two points are worth mentioning.

1) Petitioner draws a distinction between Board regulation of union conduct toward a member which causes his discharge and "union conduct toward a member which fell short of causing actual discharge from a job which he already possessed" (P. Br. 28). This distinction is plainly unten-

able. Section 8(b)(2) is designed to parallel § 8 (a)(3); it makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)"; § 8(a)(3) in turn forbids employer discrimination "in regard to *hire* or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (emphasis added). An effort to read "hire" out of this prohibition was made in *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, and was decisively rejected (*id.* at 182-187). This Court's response to the further argument that the Board was without power to require an individual to be hired, although it could direct reinstatement, was met with a response which applies equally to petitioner's argument here: "To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed" (*id.* at 188).

Thus, when Congress subjected unions to the same restrictions as employers it necessarily subjected union operated hiring halls to regulation. This Court's holding in *Teamsters Union* v. *Labor Board,* 365 U.S. 667, that the Board had overreached in laying down specific rules as to how union hiring halls were to operate, cannot remotely be read as casting any doubt on the Board's authority to prevent actual discrimination in the operation of such hiring halls for the purpose of encouraging membership; indeed, such authority was expressly recognized: "* * * the Board is confined to determining whether discrimination has in fact been practiced" (*id.* at 677).

2) Petitioner's further contention that Congress did not contemplate that hiring hall discrimination against union members would be regulated by the Board (P. Br. 28-29) simply cannot be reconciled with *Radio Officers'* broad definition of "membership" and particularly with the overriding concern of §§ 8(a)(3) and 8(b)(2) to "insulate employees' jobs from their organizational rights" (347 U.S. at 40). It is significant that immediately after that statement the Court cited § 7 of the Act which, of course, declares the organizational rights under the Act. The broad interpretation of "membership" stated in *Radio Officers* is a corollary of a broad interpretation of organizational rights under § 7, and is necessary to protect those rights against a most serious form of infringement from the employees' standpoint, the loss of job rights or job opportunities.

The very facts of two of the cases decided in the *Radio Officers* opinion demonstrated that the member-nonmember distinction proffered by petitioner for determining the scope of the Board's authority is inconsistent with the Act. At the very outset of his statement of the cases which were there decided, Mr. Justice Reed observed that Frank Boston, the discriminatee in *NLRB* v. *International Brotherhood of Teamsters,* was "a member of Local Union No. 41, International Brotherhood of Teamsters, AFL" (347 U.S. at 24); and in *Radio Officers* he stated that the discriminatee William Christian Fowler [was] a member of the Radio Officers union * * *" (*id.* at 28). And in discussing the merits of Boston's case the Court held that his discharge was for union membership because its basis was that "he was delinquent in a union obligation. * * * The union caused this dis-

crimination by applying a rule apparently aimed at encouraging prompt payment of dues" (*id.* at 42). It was on this ground that the Eighth Circuit's judgment in *Teamsters* was reversed.

The sum of the matter is that in 1947 Congress adopted a policy of *laissez faire* with regard to internal union affairs and of Board regulation with regard to union interference with job rights. The lessons to be drawn from what Congress did and what it chose not to do were summarized by Mr. Justice White in *Scofield* v. *NLRB*, 394 U.S. 423, 428-429:

> "Based on the legislative history of section [8(b)(1)(A)], including its proviso, the Court in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175, 195, distinguished between internal and external enforcement of union rules and held that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status. A union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike was therefore enforceable against voluntary union members by expulsion or a reasonable fine. The Court thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) where the Board also distinguishing internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3). These sections form a web, of which § 8(b)(1)(A) is only a strand, prevening the union from inducing the employer to use the emoluments of the job to enforce the union's rules." (Footnotes omitted.)

Against this background it is clear that this case is indeed further removed from *Gonzales* than were *Borden, Perko* and *Lockridge.* Unlike Borden and Lockridge, Hill was not expelled or suspended from the union. And unlike Borden, Perko and Lockridge, Hill did not, in the cause of action that went to trial, assert any rights under the union constitution.

Thus, the proposition which the dissenting Justices in *Lockridge* drew from *Gonzales,* that improper internal union discipline and branches of union constitutions are left to the States to redress and that in so doing the States are permitted to deal with unfair labor practice issues also implicated (403 U.S. at 308 (Douglas, J. dissenting) and *id.* at 324 (White, J. dissenting)) is of no aid to Hill. For, aside from the fact that it has been twice rejected where the "crux" of the action concerns "existing or prospective employment relations" (see *Borden,* 373 U.S. at 697; *Lockridge,* 403 U.S. at 295-296), here the only action tried was concerned with employment relations, rather than the loss of any membership rights.

We therefore need not dwell for long on the three alternatives which petitioner proffers for placing *Borden, Perko* and *Lockridge* together on one side of the preemption line and *Gonzales* and this case on the other. The first distinction, with which he himself finds "problems" depends on a repetition of the contention that the issue in this case is not "particularly within the expertise of the Labor Board" and does

not involve a "risk of inconsistency between judicial resolution of the issue and the Board's resolution * * *" (P. Br. 69). The NLRB cases summarized in the Board's brief, and those listed in the appendix thereto, provide a more than sufficient refutation.

The second distinction, "that the interference with existing or prospective employment relations in *Borden, Perko* and *Lockridge* was far more direct and immediate than in either *Gonzales* or this case" (P. Br. 71), while accurate as to *Gonzales* is, in respect to "this case" totally at variance with plaintiff's posture at trial. It quite escapes us how it can be said straightfacedly that a "continuing refusal to dispatch petitioner from the hiring hall" has a lesser impact on "actual or existing employment than a single failure to refer to an existing job" or not to involve "prospective employment in the sense that *Borden* did" (*id.*). Insofar as petitioner attempts to rationalize this attempted distinction, he simply reiterates "the fact", which *Borden, Perko* and *Lockridge* prove not to be a fact, "that regulation of [the] activity [here through § 8(b)(2)] cannot be regarded as central to the Act's purposes."

The third distinction introduces two errors. Petitioner says:

> "A third distinction, turning not on the nature of the conduct involved but on the nature of the relief afforded, is that in *Borden, Perko* and *Lockridge* the damages awarded were for lost earnings alone, a form of relief the Board could have given, while in *Gonzales* the damages award, although including lost earnings, included as well a sum for mental suffering, which was clearly beyond the Board's power." (P. Br. 72)

This is incorrect on the facts because in *Borden* the Court awarded punitive damages and in *Perko* the Court awarded damages for prospective earnings; the Board provides neither remedy. More fundamentally, this Court squarely held in *Garmon* (and implicitly reiterated in *Borden, Perko* and *Lockridge*) that it is the nature of the activity regulated rather than differences in potential remedy which determines whether an action is within the exclusive jurisdiction of the Labor Board:

> "We recognize that the opinion in *United Constr. Workers* v. *Laburnum Corp.*, 347 U.S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e. 'intimidation and threats of violence.'" (359 U.S. at 247-248; see also the elaborate footnote appended thereto, *id.* at 248, n. 6.)

Indeed, this point was at the heart of the disagreement between the majority and the concurring Justices in *Garmon*. The difference in remedial schemes is itself a reason why concurring state jurisdiction is inconsistent with the Congressional intent. See Point II, *infra*.

2. Linn v. Plant Guard Workers.

Linn v. *Plant Guard Workers*, 383 U.S. 53, undermines, it does not support, petitioner's arguments against preemption based on the fact that California law provides remedies other than those Congress provided for § 8(b)(2) violations, and that the cause of action sent to the jury rested on a generally applicable tort law rather than on a labor relations statute.

a. The premise of the Court's discussion was that stated in *Borden* (373 U.S. at 694) and quoted approvingly in *Linn*:

> "[I]n the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential 'if the danger of state interference with national policy is to be averted,' . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." (383 U.S. at 59-60)

The heart of the analysis is the following:

> "Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. *The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice.* While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation—whether he be an employer or union official—has no relevance to the Board's function. Cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. *The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.*
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the personal injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption." (383 U.S. at 63-64, footnotes omitted, emphasis added.)

Contrast the present case. While the malicious publication of libelous statements does not of itself constitute an unfair labor practice, the refusal to refer an individual out of a union hiring hall because of an intra-union dispute with a union official *does* constitute an unfair labor practice. While, because malicious libel is not an unfair labor practice, the Board cannot give *any* remedy to a defamed individual, Congress has through § 10(c) empowered the agency to remedy violations of § 8(b)(2), and of course Hill himself obtained such a remedy as the result of his charge of hiring hall discrimination.

The method of analysis used in *Linn* confirms that the nature of the remedy provided is not a touchstone for determining state jurisdiction; that was not one of the bases for determining that malicious libel is of "merely peripheral concern" of the Act. The relief available in the state court was discussed only after the Court had established that the conduct in question was not a § 8 violation. In this respect *Linn* is of a piece with *Gonzales*. In both cases state jurisdiction was premised on the fact that the conduct complained of was not an unfair labor practice. In both cases the availability of state court remedies was considered to

be a *consequence* of the determination that the state and not the Board had authority to determine whether a wrong had been committed, and not a cause for allowing jurisdiction. Thus, both cases are consistent with *Garmon* and *Borden,* and neither advances petitioner's cause.

In sum, on any view of the opinion what is critical for present purposes about *Linn* is its adherence to the rule stated in *Garmon* and followed in *Borden* that the nature of the conduct, other than violence,[18] is the touch-

[18] An additional element that led a majority of the Court to determine in *Linn* that suits for malicious libel are not preempted was acceptance of the analogy to *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656, and *Automobile Workers* v. *Russell,* 356 U.S. 634, and approved in *Garmon,* which held that the States may provide tort remedies for violent conduct in labor disputes, and may provide their normal tort remedies, including punitive damages therefor. As the Court said in *Linn,* "[i]n each of these cases the 'type of conduct' involved, i.e., 'intimidation and threats of violence,' affected such compelling state interests as to permit the exercise of state jurisdiction" (383 U.S. at 62, quoting *Garmon,* 359 U.S. at 248). The *Linn* majority "similarly conclude[d] that a State's concern with redressing libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by Garmon" (383 U.S. at 62). See also *id.* at 64, n. 6. Thus, the Court in *Linn* drew the same lesson from *Garmon's* approval of the *Laburnum-Russell* line that we do—that this is but another instance of the proposition that "conduct called into question" is the touchstone of jurisdiction, see p. 52 *supra,* quoting *Borden.*

Moreover, the phrase "deeply rooted in local feeling and responsibility" is not a general catch-all for the state laws of torts. It is intimately related to the police power. *Allen-Bradley Local* v. *Wisconsin Emp. Rel. Bd.,* 315 U.S. 740, 748-749. *Linn's* preemption of non-malicious defamation in libel suits itself establishes that the exception does not swallow the *Garmon* rule; and petitioner advances no argument to show why the relatively new tort of intentional infliction of emotional distress is of a higher dignity. Cf. *Gertz* v. *Welch,* 418 U.S. 323.

stone for determining whether the states have jurisdiction. Indeed, the foregoing portion of *Linn,* like *Garmon* itself, suggests that an activity constituting an unfair labor practice is for that reason not an activity of "merely peripheral concern of the Labor Management Relations Act."

b. The *Linn* Court did not simply determine that the states could apply their defamation laws to conduct growing out of a labor dispute. Only state suits for malicious defamation, as this Court defined malice, are not preempted. *Linn* holds that in the labor relations context all other defamation actions are beyond the States' jurisdiction:

> "We * * * limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.
>
> The standard enunciated in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwarranted intrusion upon free discussion envisioned by the Act." (383 U.S. at 64-65)

Thus, *Linn* refutes the suggestion that even where the conduct in question is not regulated directly through the prohibitions of § 8 the states are free to apply any general tort law which is not in terms addressed to

labor relations. Here, of course, the conduct in question—the alleged job discrimination and threats thereof—*is* subject to § 8(b)(2).

Linn's recognition that the NLRA preempts state tort laws of general application regulating conduct regulated by the Act as well as state labor relations law does not plow new ground. That preemption issue was met and squarely decided by a unanimous court in *Weber* v. *Anheuser-Busch,* 348 U.S. 468, 479-480:

> "Respondent argues that Missouri is not prohibiting the IAM's conduct for any reason having to do with labor relations but rather because that conduct is in contravention of a state law which deals generally with restraint of trade. It distinguishes *Garner* on the ground that there the State and Congress were both attempting to regulate labor relations as such.
>
> *We do not think this distinction is decisive.* In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct. And in *Capital Service, Inc.* v. *N.L.R.B.* 347 U.S. 501, *supra,* we did not stop to inquire just what category of 'public policy' the union's conduct allegedly violated. Our approach was emphasized in *United Constr. Workers* v. *Laburnum Constr. Corp.* (US) *supra,* where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act.
>
> Moreover, we must not forget that this case is not clearly one of 'unfair labor practices.' Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations. In *Amalgamated Asso.* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, *supra,* the statute was directed at the preservation of public utility services and not at maintenance of sound labor relations, but the State's injunction was reversed. Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised." (Emphasis added.)

The law stated in *Weber* was reaffirmed in *Garmon,* 359 U.S. at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes." (footnote omitted.)

See also *e.g., Borden,* 373 U.S. at 692; *Perko,* 373 U.S. 702-703, and *Liner* v. *Jafco,* 375 U.S. 301, all preempt-

ing suits on a common law tort theory with contractual relations. As we have stressed, it is the uniform holding of the cases that it is the type of conduct regulated which determines whether state jurisdiction is ousted and not the nature of the state law which seeks to regulate such conduct.

These precedents accord with constitutional principle. As Mr. Justice Frankfurter said in *Weber:* "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised" (348 U.S. at 480).

And, as Mr. Justice White wrote for the Court in an entirely different context:

> "We can no longer adhere to the aberrational doctrine of *Kesler* [v. *Department of Public Safety,* 369 U.S. 153] and *Reitz* [v. *Mealey,* 314 U.S. 33] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. In view of the consequences, we certainly would not apply the *Kesler* doctrine in all Supremacy Clause cases. * * * Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez* v. *Campbell,* 402 U.S. 637, 651-652.[19]

The foregoing confirms what is implicit in petitioner's own description of *Linn,*—that the exception therein declared is not applicable here. He states four requirements which must be met if the cause of action under state law is to be allowed. The various elements of that four-part test need not be analyzed, because it is clear, contrary to his contention, that he cannot meet the first part of his own test: that "the conduct in question does not *ipso facto* constitute an unfair labor practice (383 U.S., at p. 63)" (P. Br. 57). In contending that he does meet this test, petitioner says:

> "(1) In the first place, *the bulk of the conduct involved here* is not automatically an unfair labor practice. In fact, much of it is obviously not, only a small part of it (if any) is a clear unfair labor practice and the remainder may or may not amount to an unfair labor practice, depending upon the view taken of its primary motivation." (P. Br. 57)

In terms of sheer "bulk" the conduct with which petitioner charged the unions was, it must be reiterated, discrimination in the operation of a hiring hall on the basis of opposition to the union business agent and his

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[19] While the Court was divided on the interpretation of the Bankruptcy Act in *Perez* (as it had been in reaching the opposite result in *Kesler* and *Reitz*), the *Perez* minority did not take issue with this interpretation of the Supremacy Clause. Indeed, they agreed that the state statute there challenged was invalid in part (*id.* at 668-671), a result which could not have been reached if the purpose of the state law, rather than its effect in "interfering with the paramount federal interests in [the wife's] bankruptcy discharge" were controlling under the Supremacy Clause (*id.* at 671).

policies; if the jury believed, as petitioner asked it to, that the union engaged in discrimination, this clearly *does "ipso facto* constitute an unfair labor practice." (383 U.S. at 63)

C. The Duty of Fair Representation and LMRDA Theories Are Not Properly Before This Court.

Petitioner also invokes the exceptions to *Garmon* for actions based on the breach of a duty of fair representation (under § 301 of the Labor Management Relations Act ("LMRA")) and for improper imposition of union discipline (under §§ 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA")). Neither of these issues is properly before this Court.

Petitioner says:

> "The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions described above. It may be that those causes of action and the various other applicable exceptions are not before this Court *in any direct sense,* but the other exceptions do merit consideration here because they illustrate to what extent Congress and the courts have permitted lawsuits founded upon conduct supposedly within the purview of the Labor-Management Relations Act and the jurisdiction of the Board, and thus what kinds of conduct may be regarded as of only peripheral concern to the scheme of labor relations regulation embodied in the Act." (P. Br. 84, emphasis added.)

If the only purpose of petitioner's discussion were, as this passage suggests, to buttress his argument on the question presented by the Petition, of whether the court below erred in holding that petitioner's tort claim was preempted under *Garmon*, it would be entirely appropriate though not particularly helpful to petitioner's case.[20] But petitioner does not stop there, for he actually invites this Court to consider the duty of fair representation and LMRDA theories on their merits, and to reinstate the jury's verdict on one of those grounds (P. Br. 85-111), although conceding grudgingly that it "may be" that these issues are not before the Court "in any direct sense" (P. Br. 84). Given these inconsistent positions (a tactic which we have observed in other contexts as well, see pp. 25, 38 and 40 *supra*), we find it necessary to point out that these issues are not properly before this Court because 1) this Court's jurisdictional requirements have not been met; and 2) reliance on either of these theories to sustain a verdict after a trial which was limited to plaintiff's claim under state tort law would deny the defendants due process of law.

1. Jurisdiction

The single "Question Presented" by the Petition for Certiorari, though argumentatively phrased, squarely

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[20] In that respect these theories do not aid petitioner, for both exceptions result from deliberate Congressional judgments to create independent causes of action which may be maintained in the courts rather than before the National Labor Relations Board. They thus do not in the least affect the principle that state claims are ousted where the conduct is governed by §§ 7 and 8 of the National Labor Relations Act, the administration of which is in the exclusive domain of the Labor Board. Indeed, *Boilermakers* v. *Hardeman*, 401 U.S. 233 expressly acknowledged the *Garmon* principle (*id.* at 240), although, as the concurring opinion notes (*id.* at 247) there was no occasion to either reaffirm or reiterate therefrom. *Hardeman* simply parallels *Gonzales* in that it permits lost wages to be recovered as consequential damages for loss of membership where such loss is independently actionable: "The critical question in this action is whether Hardeman was afforded the rights guaranteed him by § 101(a)(5) of the LMRDA", a question "irrelevant to the legality of conduct under the NLRA" (*id.* at 241).

presents the federal question on which the Court of Appeal set aside the trial court's judgment, whether the plaintiff's second cause of action under the state law of torts for intentional infliction of emotional harm, is preempted by the Taft-Hartley Act. It says nothing about the duty of fair representation or union discipline in violation of the Labor Management Reporting and Disclosure Act of 1959. Petitioner's question cannot be read to "fairly comprise[ ]" the two distinct statutory grounds for reversal argued at Pet. 85-111; they are not properly before this Court under Rule 23(1)(c). This is a flagrant instance of the disapproved practice of "smuggling additional questions into a case after we grant certiorari" (*Irvine* v. *California,* 347 U.S. 128, 129 (opinion of Mr. Justice Jackson)). See also *e.g., Radzanower* v. *Touche, Ross & Co.,* 44 U.S.L.W. 4762, n. 3 (June 7, 1976); *F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 121, n. 6; *Carpenters Union* v. *Labor Board,* 357 U.S. 93, 96.

Further, petitioner has not met the requirement of Rule 23(1)(f):

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * * and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, * * * as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In the Statement of the Case there was no mention of the LMRDA at all. The only mention of the duty of fair representation is: "The first cause of action substantially pleaded a breach of the union's duty of fair representation" (Pet. 9-10). Petitioner noted that demurrers to that and two additional causes of action were sustained (Pet. 10). The only additional reference to these other causes of action was that "judgment was never entered with respect to them (Pet. 10, n. 4, quoted in full at p. 21 *supra*). Petitioner did not even state whether, in his view, the Court of Appeal, in reversing the judgment on Count 2 considered and decided against him the proposition that the verdict should stand because of these alternative statutory theories. If it is his position that the Court did decide that question, then it would have been incumbent on him to show that there was no adequate state ground for its refusal to read these new legal theories back into the verdict. And if it is his position that neither of the state appellate courts decided the duty of fair representation or LMRDA issues, petitioner was required to meet the burden imposed by the rule declared in *Street* v. *New York,* 394 U.S. 576, and reaffirmed in *Fuller* v. *Oregon,* 417 U.S. 40, 50:

> "[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Petitioner of course has made no effort to make such a showing. Indeed, he has entirely ignored the jurisdictional requirements which this Court has imposed for focussing the issues before it, and for assuring itself that, in cases arising out of the state courts those issues have been properly presented below and do not rest on a state ground which would pretermit review here, *Murdock* v. *Memphis,* 20 Wall. 590, 632-636.

2. The two issues were not before the jury.

In arguing that "the allegations of the single surviving cause of action" (P. Br. 84) may be sufficient to state a claim under the duty of fair representation and LMRDA theories, petitioner says:

> "at least as to cases involving breach of the duty of fair representation, this Court had held that in order to do substantial justice, the pleadings must be liberally construed (See *Czosek* v. *O'Mara,* 397 U.S. 25, 27 (1970) and both federal and California law have long rejected the doctrine of 'theory of the pleadings.'" (P. Br. 84-85, citing cases.)

We of course fully accept the *Czosek* rule, and assume that it applies likewise for pleading a cause of action under the LMRDA; we further assume, that if California had a different rule (which it does not, as petitioner notes), the California courts would be required to follow the federal rule in determining whether federal causes of action are properly pleaded. But, the *Czosek* rule of liberality in the reading of *pleadings* has nothing to do with the case in its present posture. Petitioner is not asking this Court to read the second cause of action to determine if it stated a litigable claim, sufficient to rebuff a motion to dismiss. We are dealing with a full blown cause of action that had been put to trial on the merits, a cause of action whose common-law tort theory had ripened into supporting and opposing evidence and ultimately into submission to a jury with instructions setting forth the elements which the plaintiff was required to prove on that theory. (See IA. 34, quoted pp. 14-15 *supra.*) Petitioner acknowledges that "* * * it is true that the jury was not specifically instructed on the law governing an action for breach of the duty of fair representation * * *" (P. Br. 95). In completing that thought, however, he says "the instructions actually given imposed on Petitioner a far more onerous burden of proof" asserting that "outrageous conduct which inflicted severe emotional distress" is more than "arbitrary or bad faith conduct" (*id.*).

Petitioner thus assumes, as he must, that union arbitrariness *vis-a-vis* its members *per se* is sufficient to make out a breach of the duty of fair representation. For the jury had no guiding instructions with respect to any elements of this federal violation. For example, the jury was not instructed that it had to find that the union caused a violation of the collective bargaining agreement in order to establish liability. (Cf. *Hines* v. *Anchor Motor Freight,* — U.S. —, 44 U.S.L.W. 4299). Moreover, petitioner introduced evidence of conduct other than discrimination in the operation of the hiring hall (see A-21, and P. Br. 50). While we do not agree with petitioner (*id.*) that this other conduct played a substantial role in the liability determination, the verdict makes this uncertain, and it is more probable than not that the evidence had its intended effect of increasing the general and punitive damages which the jury awarded.

But the duty of fair *representation,* as the very phrase demonstrates, does not encompass every arbitrary action by a union. As Chief Justice Stone said in creating and defining the duty "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft" (*Steele* v. *Louisville & N.R.*

Co., 323 U.S. 192, 204). Here the case that went to the jury and which produced the general verdict was not limited to acts of the union as "the statutory representative."[21] In short, even if, as petitioner says, "the first cause of action *substantially* pleaded a breach of the union's duty of fair representation" (P. Br. 11, emphasis added), the defendants would not have been on notice that the duty of fair representation claim was involved in the trial. Actually, the word "substantially", is an important qualification, because plaintiff said nothing about the duty of fair representation in resisting the demurrer or at any time in the trial court; that theory first came into the case in the Court of Appeal. Thus, while under *Czosek* a Court, in ruling on a motion to dismiss (or on appeal from the granting of such a motion) might arguably treat the first cause

[21] *Richardson* v. *Communication Workers*, 443 F.2d 974 (C.A. 8) which arose on extreme facts, see *id.* at 983, n. 12, is to that extent completely inconsistent with the underlying theory of the duty.

We also submit that a discriminatory refusal to refer out of a union hiring hall is not a breach of the duty of fair representation, although it will frequently be a breach of a collective bargaining agreement. When a union operates a hiring hall its authority to do so derives not from its status as exclusive bargaining representative, but from the collective agreement itself. In that situation the union is responsible for the hiring decision, and the employer is not implicated at all. *Cf. Hines, supra. Smith* v. *Sheet Metal Workers*, 500 F.2d 741 (C.A.5) cited for the contrary proposition, at P. Br. 88, adopted a fundamentally incorrect approach to the duty of fair representation. It stated that the jurisdictional basis for a duty of fair representation suit is not § 301, but 28 U.S.C. § 1337; see *id.* at 746-747, a view squarely contrary to *Humphrey* v. *Moore*, 375 U.S. 335 and its progeny. The present point was not discussed and apparently not argued. Plainly the *Smith* opinion, aside from its more basic infirmity, "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, 416 U.S. 725, 740).

of action as sufficiently raising a duty of fair representation claim—if anyone called that interpretation to its attention—defendants had no notice of this whatsoever.[22]

Moreover, on petitioner's theory of the ground on which jury verdicts can be sustained, the pleadings are actually irrelevant. For petitioner urges this Court to affirm on the LMRDA ground, even though he nowhere asserts that that theory was raised by his pleadings "substantially" or otherwise. And of course, the jury was given no instructions with respect to the elements of an LMRDA violation either.

Furthermore, pleadings do have a purpose—to give notice to the adversary concerning what the issues will be at trial. Here, since the case went to trial only on the second cause of action the defendants had no notice that they would be called upon to defend a duty of fair representation claim or a claim for improper discipline in violation of the LMRDA. In fact, plaintiff painstakingly excluded from the single count that went to trial the allegations of the complaint (par. 6 and 7) which set forth certain provisions of the collective bargaining agreement and the hiring hall rules.

Petitioner is equally casual about defenses that respondents could have raised if they had had notice that anything but a tort claim would be tried with respect to the exhaustion of internal union remedies. Peti-

[22] Moreover, it is one thing to read a federal pleading generously to sustain a federal cause of action or a state court pleading to raise a state cause of action. But to read a federal cause of action into a state court pleading long after the event deprives the defendant of his statutory right to remove the federal cause of action.

tioner asserts that the facts show that defense would be without merit. For this he cites the answers to the interrogatory which do not substantiate his position, which, though reproduced in the appendix do not appear ever to have been introduced in evidence,[23] and above all with respect to which the jury (which after all is the fact finder) was given no instructions. There are doubtless many other ways in which defendants' trial judgments, including the introduction and objection to evidence, and request for instructions, would have differed if the duty of fair representation and LMRDA had been in issue. And, it is not unlikely that the plaintiff, too, would have tried the case differently, for example, by requesting instructions on the elements of violation under those theories.

The tacit assumption of petitioner's argument is that one party can be heard to argue after the event what the nature of its adversary's defense would have been if it had been on notice that a particular theory of a claim was being litigated, and further to infer what verdict the jury would have reached (not only as to liability but as to the precise amount of damages) if the case had been tried on the alternative theory and the jury had been properly instructed. This Kafkaesque approach to litigation is an affront to the most rudimentary requirements of "due process of law—using that term in its primary sense of an opportunity to be heard and to defend [the party's] substantive right" (*Brinkerhoff-Faris Trust & Sav. Co.* v.

[23] The reference "CT 478, 483" (P. Br. 89) refers to the Clerk's transcript consisting of the formal documents. Petitioner does not assert that this particular interrogatory, and the answers thereto, were ever read into the record, and it is the recollection of trial counsel that they were not.

Hill, 281 U.S. 673, 678, Brandeis, J.). Cf. *Hardeman,* 401 U.S. at 245, discussing notice under § 101(a)(5) —the LMRDA's "due process" provision.[24]

II. PETITIONER'S RELIANCE ON THE ACT OF DISCRIMINATION FOUND BY THE LABOR BOARD AND ON THE BOARD'S DETERMINATION INDEPENDENTLY SUPPORTS THE COURT OF APPEAL'S JUDGMENT.

Petitioner argues that this Court should abandon the preemption test stated in *Garmon* and should instead adopt the standard articulated in *Teamsters Union* v. *Morton,* 377 U.S. 252 (P. Br. 120-135). We submit that *Garmon* should remain the law, because it is soundly reasoned, given the judgments which Congress made in enacting the NLRA, and given the general principle of *stare decisis,* which in this instance is reinforced by the legislative ratification effected when Congress in 1959, fully conscious of the *Garmon* principle, preserved the exclusive federal role with

[24] Compare, also, *Silver* v. *New York Stock Exchange,* 373 U.S. 365, n. 18:

> "The principle that a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis is reflected in many state-court decisions, *resting* on various theories of liability.
>
> • • •
>
> The precedents cited undoubtedly rest on a recognition that the according of fair procedures is of fundamental significance, that serious and irreversible economic injury may result from their denial in a context like that of the present case, *and that a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance.*" (emphasis added.)

respect to conduct regulated by the Act and over which the Board has retained jurisdiction.[25]

In any event, we submit the analysis which petitioner embraces, and which originates with Professor Cox [26] is inconsistent not only with *Garmon* but also with *Morton*. For *Morton* and *Garmon* do not state antithetical doctrines. Both apply the same statute and

[25] See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1094-1095:

> "Considered in the context of the LMRDA, the new formula for allocating jurisdiction over labor-management disputes between the federal government and the states is something of a paradox. Ostensibly, it nullifies the decisions of the Supreme Court in the *Guss* and companion cases and restores a measure of power to state courts and agencies. Its net effect, however, is to adopt the long line of Supreme Court decisions confirming the federal government's preemption of the labor-relations field; while throwing a few crumbs to the states, Congress made it clear that the lion's share of labor cases is reserved exclusively for the NLRB and the federal courts. The expansion of federal power is even more dramatically illustrated, of course, by the other titles of the LMRDA creating federal standards for the conduct of internal union affairs—an area previously within the exclusive control of the states." (footnote omitted.)

The legislative ratification of *Garmon* is fully discussed in the brief *amicus curiae* of the AFL-CIO in this case which we adopt and shall not duplicate.

[26] Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972).

Contrary to petitioner, however, even under Prof. Cox's view petitioner would not be entitled to prevail, for Prof. Cox agrees that the results in *Borden* and *Perko* were correct, 85 Harv. L. Rev. 1376, n. 174. Since this case is on all fours with *Borden*, see pp. 36-37 *supra*, approval of *Borden* requires affirmance of *Hill*.

the same Supremacy Clause. Both are concerned with conflict between the NLRA and state law.[27]

Garmon was "concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration" (359 U.S. at 243). *Morton* dealt with conflict only in the first two of these three categories. The conflict concerning "administration"—that is, the exclusivity of the primary jurisdiction of the National Labor Relations Board—was not involved in *Morton* because the conduct complained of included the secondary boycott. For Congress, having regarded the secondary boycott (and other violations of § 8(b)(4)) to be particularly serious unfair labor practices, provided an additional remedy for persons injured thereby—§ 303(a) restated § 8(b)(4)'s prohibitions, and § 303(b) provided a federal court action for actual damages proximately caused by the violation of § 303(a). And *Morton* was a suit under § 303(b) to which the plaintiff attached a pendent claim under the common law of Ohio. He recovered a judgment for damages caused by the violation of federal law, and further compensatory damages for two violations of state law. Addi-

[27] To the extent that the Cox analysis is based on the nature of the law which the state is seeking to enforce, it is unsound for the reasons developed at pp. 55-59 *supra*. We note particularly that Prof. Cox's analysis of *Linn*, *id.* at 1367-1368, fails to take account of the fact that the state tort law of non-malicious defamation *was* preempted, see pp. 55-56 *supra*. We recognize that Mr. Justice Powell and the Chief Justice referred with approval to that part of the analysis in *Machinists* v. *Wisc. Emp. Rel. Bd.*, — U.S. —, 44 U.S.L.W. 5026, 5033. But the point was not argued in that case, and the objections to that view in principle and precedent were not therefore fully developed. Cf. *Bob Jones University* v. *Simon*, 416 U.S. at 740, quoted at p. 66, n. 21 *supra*.

tionally, he was awarded punitive damages. The Court determined that because the Ohio common law prohibited conduct which federal law did not prohibit, and thereby left to the free play of economic forces, a damage award under the Ohio law conflicted with federal policy and could not stand. This clearly was an example of what *Garmon* described as a conflict with the "federal scheme of *law*" (*id.*, our emphasis). *Morton* also exemplifies conflict with the federal scheme of "remedy". For, the *Morton* court also reversed the punitive damage award:

> "Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated *only* state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages." (377 U.S. at 260-261, footnote omitted, emphasis added.)

For present purposes, the essential point of the foregoing is that because Congress had determined to permit only actual compensatory damages for illegal secondary boycotts, punitive damages could not be recovered for the same conduct under the state law which also prohibited such boycotts. In other words, insofar as state law exceeded the substantive prohibitions of federal law, the state law was preempted by the substantive limitations on § 303 liability, and to the extent that there was an overlap between state law and § 303, insofar as the state remedy exceeded the federal remedy, the state remedy was preempted by the remedial limitations on § 303 recoveries.[28]

The lesson for the present case is clear. As plaintiff chose to litigate this case, the jury was invited to determine liability and/or assess damages on the basis of the precise unfair labor practice which the National Labor Relations Board had already remedied by a back pay award in excess of $2500 (together with the usual cease and desist and notice posting requirements). The jury was instructed that it could award damages supplementing that back pay award for that conduct although, as the instruction clearly stated, the Board was without authority to award damages for medical expenses, pain and suffering or punitive damages. It is such supplementation of federal remedies, for unfair labor practices by state remedies, including punitive damages, for exactly the same conduct, which *Morton* held to be impermissible conflict. On this proposition *Garmon* and *Morton* are as one. The policy, embodied

[28] The Court's disposition of a further issue in the case (*id.* at 261-262) can be analyzed in terms of either a substantive or remedial conflict.

in § 10(c), that there should be no punitive damages for violations of § 8, is older than and equally strong as, the identical policy embodied in § 303.

The fullest statement of that policy is that of Chief Justice Hughes in *Republic Steel Corp.* v. *Labor Board,* 311 U.S. 7, 10-12:

> "We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights to provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.
>
> "The remedial purposes of the Act are quite clear. It is aimed, as the Act say (§ 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives.
>
> * * *
>
> "* * * We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board of inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 325, 236. See, also, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267, 268. We adhere to that construction.
>
> "In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

See also, *Local 60, United Brotherhood of Carpenters* v. *Labor Board,* 365 U.S. 651, 655; *Local 57, International Ladies' Garment Wkrs.' U.* v. *N.L.R.B.,* 374 F.2d 295, 303-304 (D.C. Cir., Burger, J.).

To allow punitive damages under state law for conduct regulated by § 8(b)(2) when such damages may not be recovered under state law for conduct regulated by § 8(b)(4) (and § 303) would be wholly inconsistent, not only with the foregoing, but with the scheme of values which led Congress to allow a judicial remedy only for the latter unfair labor practices. In sum, as Chief Judge Parker said in *United Mine Workers* v. *Patton,* 211 F.2d 742 (C.A. 4), cert. denied 348 U.S. 824:

> "Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute,

it has found no difficulty in using language appropriate to that end * * *.

* * * *

"In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In Amazon Cotton Mill Co. v. Textile Workers Union of America, 4 Cir., 167 F.2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act, 45 U.S.C.A. § 151 et seq., to the effect that, 'The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate'. We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions." (211 F.2d at 749-750).[29]

[29] While the issue is not before the Court, see point IC, *supra*, we think it may not be inappropriate, given petitioner's elaborate discussion of the matter, to observe that the Congressional policy against punitive damages implemented in the cases discussed in the text precludes the imposition of such awards in suits for breach of the duty of fair representation and under the LMRDA as well, for both are also expressions of the national labor policy. Petitioner's argument for punitive damages because of their deterrent effect is squarely refuted by *Republic Steel*. See also *Garment Workers*, p. 75, *supra*, "Deterrence alone is not a proper basis for a remedy" (374 F.2d at 303). So too Congress has abjured retribution.

Petitioner adds a third justification for an award of punitive damages—as compensation for lost wages not sought: "* * * Due to the uncertain state of the law as a result of decisions like *Borden, Perko* and *Lockridge*, Petitioner refrained from seeking lost wages, and the jury was instructed that no lost wages could be awarded. (CT 102-114, 530; App. 1-16, 41.)" (P. Br. 109). Suffice it to say here that such an argument departs again from basic notions of due process. But its statement emphasizes the unrestricted nature of the punitive damages concept and the inconsistency of that concept with the careful balances struck by our national labor policy. More than that, petitioner's argument in the context of this case assumes that the jury disregarded an instruction given at *plaintiff's* behest.

The state court's award of punitive damages (and by a parity of reasoning, for compensatory damages of a kind not authorized by the NLRA) conflicts with the federal scheme of remedies and thus may not stand whether *Garmon* or *Morton* governs.

CONCLUSION

For the reasons stated at pp. 21-27, the judgment below is not final and the writ of certiorari should be dismissed for want of jurisdiction. If the merits are reached, the judgment of the Court of Appeal should be affirmed.

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APPENDIX

APPENDIX

Statutes and Rules Involved

Sections 7, 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(a), (b) and (c) of the National Labor Relations Act of 1935 as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 73 Stat. 519, *et seq.* provide in pertinent part as follows:

> § 7. Right of employees as to organization, collective bargaining, etc.
>
> Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> § 8. Unfair labor practices
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • • • • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •
>
> (b) It shall be on unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; • • •

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§10. Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where dominantly local in character) even though such cases may involve State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless

the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 8, and in deciding such cases, the same regula-

tions and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

28 U.S.C. § 1257(3) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: • • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rule 23(1) of the Supreme Court of the United States provides in pertinent part:

• • •

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

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(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.